86-1050

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

No.

LOUIE L. WAINWRIGHT, etc., et al,

Petitioners,

v.

EARNEST LEE MILLER & WILLIAM RILEY JENT,

Respondents.

PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I.

Whether a Federal Court Should in The Exercise of Its Habeas Jurisdiction Compel the Production of Secret Grand Jury Testimony For Its Own In Camera Review Where There is no Specific Claim Before it That The Testimony Contains Material the Disclosure of Which is Mandated by the Fourteenth Amendment or any Other Amendment Working Through It?

PARTIES TO THE PROCEEDING

Petitioners in the action are LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections; RICHARD DUGGER, Superintendent, Florida State Prison; and JIM SMITH, Attorney General of the State of Florida. All Respondents are named in the caption.

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OPINIONS BELOW

Petitioners seek review of the decision of the United States Court of Appeals in Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1986).

JURISDICTIONAL STATEMENT

This court has jurisdiction to review the decision of the Court of Appeals on petition for certiorari under 28 U.S.C. §1254(1). The court below decided this case on August 14, 1986. Petitioners filed a petition for rehearing which the Court of Appeals denied September 26, 1986. The Court of Appeals issued as mandate its judgment in this case October 7, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. §2254(a) provides:

"(a) The Supreme Court, a justice thereof, a circuit judge or a District Court shall entertain an application for a Writ of Habeas Corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws

or treaties of the United States.

Rule 2(c), 28 U.S.C. fol. §2254, provides:

> The petition shall be in substantially the form annexed to these rules, except that any district court may by local rule require that petitions filed with it shall be in form prescribed by the local rule. Blank petitions in the prescribed form shall be made available without charge by the clerk of the district court to applicants upon their request. It shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified. It shall also state the relief requested. The petition shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the petitioner.

STATEMENT OF THE CASE

A grand jury sitting in Pasco County Florida indicted both respondents for murder in the first degree. The state's case against both respondents rested primarily on the testimony of eyewitnesses to the crime. Three of those eyewitnesses testified in respondent Jent's trial. And, two of them tesified in respondent Miller's trial.(A.6,72,102) Petitioner's were both successful in having the state court order that the grand jury testimony of the witnesses be preserved. Both sought access to the testimony of these witnesses on the ground that their deposition testimony was inconsistent with accounts of the crime given to the police. The state court declined to order its disclosure. (A.6,72) Both respondents impeached these witnesses' trial testimony with deposition testimony. Both were, nevertheless, convicted and sentenced to death. (A.72)

The Florida Supreme Court affirmed both convictions and sentences on direct appeal. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 111 (1982); Miller v. State, 415 So.2d 1262 (Fla. 1981), cert. denied, 459 U.S. 1158 (1983). Both respondents sought relief on direct appeal, inter alia, on the ground that the trial court had abused its discretion in denying them access to the grand jury testimony of these witnesses. (A.7,73 n.5)

Following clemency proceedings, Florida's Governor signed death warrants for both respondents calling for their simultaneous executions. The results of the proceeding in the state courts afforded them no relief. The decisions on their applications for collateral relief in state court are reported as Jent v. State, 435 So.2d 809 (Fla. 1983) and Miller v. State, 435 So.2d 813 (Fla.

1983).

Having failed to stay their executions in state court, respondents sought relief in the United States District Court for the Middle District of Florida under the provisions of 28 U.S.C. §2254. (A.1,50) Both are in the custody of the State of Florida.

In district court, each respondent claimed, inter alia, that the absence of an in camera review by the state trial court of the grand jury testimony of the eye witnesses rendered their trials fundamentally unfair. (A.6,71) They each offered the district court the conclusion that grand jury testimony of these witnesses was exculpatory. (A.6,72) The factual basis given for this conclusion was that there were inconsistencies between statements given to police and their deposition testimony. (A.6,72) The district court considered both

petitioner's claims with regard to this issue and denied them both relief without an evidentiary hearing addressing this issue in interim orders which reserved other issues for an evidentiary hearing. (A.9,73) Respondents neither sought discovery of this material in district court nor asked the district court to conduct its own in camera review of the testimony.

In a per curiam opinion for a panel of Roney, Fay and Johnson, the Court of Appeals ruled respondents were entitled to an in camera hearing by the federal district court to determine whether they had shown a particularized need for these transcripts. (A.103-05) It ruled that the district court had erroneously used the particularized need standard instead of the lower standard that is sufficient to justify an in camera determination of whether that standard has been met.

(A.105) The Court of Appeal's decision on this issue fails to state any constitutional basis for its ruling. All cases to which the decision makes reference on this issue are decisions of less than constitutional magnitude.

REASONS FOR GRANTING THE WRIT

1) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE TEACHINGS OF THIS COURT ON THE OFFICE OF THE WRIT OF HABEAS CORPUS.

The decision of the Court of Appeals directs the district court to exercise power in excess of that granted by the habes statute for persons in custody pursuant to a judgment and sentence of a state court. Neither Section 2254 nor this court's decisions interpreting it suggest that it may do service as a "fishing expedition" so that a petitioner can go out in search of his case.

2) THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND UNDERMINES THE RULES FOR THE ADMINISTRATION OF THE WRIT AND MAY MARK THE BEGINNING OF A TREND TO USE THE WRIT IN THE NATURE OF DIRECT APPEAL.

The proper officer of the writ is to afford a forum for relief to those who can state a prima facie claim that they are

being held in custody in violation of the constitution and laws of the United States. See e.g., Hill v. Lockhart, 106 S.Ct. 366 (1985) (specific allegation o prejudice needed to justify federal consideration of claim that counsel was not effective). For this reason Rule 2(c), 28 U.S.C. fol. §2254 requires that the petition set forth the grounds for relief asserted and the facts supporting those grounds. The decision of the Court of Appeals undercuts the requirements of the law as espoused by this Court and Congress.

This Court has already expressed its concern with the requirement that there be a factually specific claim before the district court in one case already set for consideration this term. McCotter v. Petty, No. 85-1656, cert. granted, June 30, 1986 [39 CrL 4087, 88] (Issue I). Because the decision in this case is

unprecedented, calls for action by the district court in excess of the jurisdiction conferred by 28 U.S.C. §2254, is plainly in conflict with both the presumption recognized repeatedly in recent years by a majority of this Court of finality and regularity which attaches to a state court judgment and sentence that has become final and is effectively a repudiation of the principle of comity that is to govern the administration of the writ, this issue should review it.

The decision of the Court of Appeals is in conflict with this court's ruling on the use of discovery tools in a habeas corpus case. Use of the discovery tools is limited to the discretion of the district court upon a showing of good cause. Rule 6(a), 28 U.S.C. fol. §2254 This court defined the appropriate circumstances for the use of discovery in Harris v. Nelson, 394 U.S. 286 (1969).

The decision authorizes discovery during the course of a habeas action as follows:

> [W]e conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus which establishes a prima facie case for relief may use or authorize the use of suitable discovery procedures. . .
>
> **394 U.S. at 290.**

On its face, the decision below demonstrates that respondents have been unable to demonstrate a prima facie case for relief. And, it may mark the beginning of a trend in the Eleventh Circuit of directing evidentiary proceedings in death casees in the absence of a concrete factual claim of a constitutional violation. Consider, Porter v. Wainwright, No. 85-2832 (11th Cir. Nov. 17, 1986) (Hill, J. dissenting) (evidentiary hearing ordered despite fact that petitioner's claim showed only possible conflict of interest on the part

of counsel). The court should take this opportunity to put an end to the Eleventh Circuit's apparent tendency to transform the writ into a general purpose tool for supervising the courts of the states that fall within its territorial jurisdiction.

3) THE DECISION OF THE COURT OF APPEALS IS STRUCTURED IN SUCH A WAY AS TO DESTROY THE PUBLIC INTEREST IN FINALITY OF JUDICIAL PROCEEDINGS AND IN CONFLICT WITH DECISIONS OF THIS COURT ON THAT QUESTION.

The decision below directs the district court to behave as though it were the Florida Supreme Court reviewing respondents' judgments and sentences on direct appeal. The Court of Appeals' order is plainly inconsistent with presumption of finality and legality which has now attached to respondents' judgments and sentences. Autry v. Estelle, 464 U.S. 1 (1983) quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983). See also Kuhlmann

v. Wilson, 106 S.Ct. 2626-27 (1986); Hill v. Lockhart, 106 S.Ct. at 370.

As outlined above, the decision of the Court of Appeals is a dramatic departure from the customary use of the writ. By granting the relief it did, the Court of Appeals made a virtually unprecedented decision. Examination of the authorities to which the decision makes reference shows that none involve habeas or a federal court's review of a state court decision. The Court of Appeals' decision is an affont to Florida's interest in the finality of its judgments and sentences. The decision to order the district court to review the grand jury testimony in camera is nothing less than a deliberate rejection the presumption of regularity and finality that has attached to respondents' judgments and sentences. It is not only unprecedented in this respect but in

direct conflict with those presumptions as they have been created and recognized by decisions of this court previously mentioned. The radical and unprecedent nature of the relief granted is a compelling reason for this court to exercise its certiorari jurisdiction in this case.

CONCLUSION

WHEREFORE, petitioners ask for the granting of a writ of certiorari to the Court of Appeals in this case.

CERTIFICATE OF SERVICE

I, DAVIS G. ANDERSON, Counsel for Petitioner, and a member of the Bar of the United States Supreme Court, hereby certify that on the _____ day of December, 1986, I served three copies of the Petition for Writ of Certiorari on **Howardene Garrett**, Assistant Public Defender, Room 202, Pasco County Courthouse, 705 E. Liveoak, Dade City, Florida 33523, **David L. Roll**, Steptoe & Johnson, 1330 Connecticut Ave., N.W., Washington, D.C., 20036 and to **Eleanor Jackson, Piel**, 36 West 44th Street, New York, New York, 10036 by a duly addressed envelope with postage prepaid.

DAVIS G. ANDERSON
Assistant Attorney General

A P P E N D I X

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A P P E N D I X

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WILLIAM RILEY JENT,

Petitioner,

vs. Case No. 83-860-Civ-T-13

LOUIE L. WAINWRIGHT, et al.,

Respondents.

_____/

MEMORANDUM OF DECISION

This cause comes before the Court pursuant to petitioner's 28 U.S.C. §2254 petition. The petitioner has been sentenced to death and was scheduled for execution on July 19, 1983. The original habeas petition was filed on July 15, 1983 and, by necessity, this Court stayed the scheduled execution in order that the petitioner's claims might be fully considered. The parties have now completely briefed their respective positions.[1]

1/ There was a very short time period between the Florida Supreme Court's review

FACTS SURROUNDING THE OFFENSE

On July 13, 1979, the badly burned body of a still unidentified young woman was found in a Pasco County game preserve. Six weeks later an indictment was issued by the grand jury charging the petitioner and his stepbrother, Ernest Miller, with premeditated murder. The petitioner and his stepbrother were convicted of first degree murder in separate trials.

The main evidence against the petitioner came from three eye witnesses to the crime - Carlena Jo Hubbard, Glenna Frye and Patricia Tirikaine. These witnesses testified that they were part of a group of eight people who had gathered for a party near a swimming hole on the Withlacoochee River in Pasco County. All those attending the party had been drinking to various degrees and there was

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of the petitioner's Rule 3.850 motion and the scheduled execution. The petitioner anticipated the Florida Supreme Court's denial of his motion. Consequently, the original petition contained both exhausted and unexhausted claims. All claims were exhausted subsequent to the decision by the Florida Supreme Court on the petitioner's Rule 3.850 motion. The petitioner has also filed a first amendment to his petition. That amendment as well as all memoranda in support of and in opposition to the petition have been considered.

some use of drugs. During the party the victim - tentatively identified during the trial as "Tammy" - arrived at the scene by some unknown means. Tammy began fighting with one of the group - Samantha Carver. The petitioner pulled Carver off of Tammy and began to beat Tammy with his fists. Codefendant Miller then joined in the beating which became increasingly vicious. Using a stick, Miller then beat the victim into unconsciousness.

Miller and the petitioner placed the victim in the trunk of Miller's car and returned to Miller's house. Tammy was taken out of the trunk and raped on the back of the trunk by the four men in the group, including the petitioner and Miller. The three testifying eyewitnesses watched the rape.

After the rape the victim was placed back in the trunk of the car and the entire group except for one member drove to the game preserve. The petitioner and Miller took the victim out of the trunk and laid her on the ground. Tammy tried to get up but the petitioner knocked her down. Miller then poured gasoline on the victim and set her on fire.

Besides the testimony of the eyewitnesses, the state introduced expert testimony of microscopic hair comparisons which identified hair retrieved from the scene of the crime as the petitioner's. The state also presented the testimony of the petitioner's cellmate, James Ray Boone, who stated that the petitioner had told him of the murder while in prison.

PROCEDURAL HISTORY OF THE PETITION

Following a jury trial the petitioner was convicted of first degree murder on December 21, 1979. On advice of his trial counsel, the petitioner did not testify at either the guilt or sentencing phase of his trial. Following the jury's recommendation, the trial judge sentenced the petitioner to death on January 30, 1980.

The petitioner appealed to the Florida Supreme Court which affirmed both the conviction and sentence and subseqently denied the petitioner's request for a rehearing. See Jent v. State, 408 So.2d 1024 (Fla. 1981). The United States Supreme Court denied a petition for certiorari on June 7, 1982.

In March, 1983 the petitioner filed a Motion to Vacate, Set Aside or Correct Conviction and Sentence pursuant to Fla.R.Crim.P. 3.850 in the Circuit Court of the Sixth Judicial Circuit for Pasco County, Florida. On June 24, 1983, the trial court denied the petitioner's motion in part but ordered a hearing on the petitioner's claims of ineffective assistance of counsel. After a July 12th hearing on this issue, the trial court denied the petitioner's Rule 3.850 motion. The Governor of the State of Florida had signed a warrant for the execution of the petitioner on July 19, 1983. Therefore, in order that this Court be given time to review the instant petition, the Court stayed the execution on July 18, 1983 - the day the petition was filed. The petitioner presents eight grounds for relief in his petition. There is no dispute that the petitioner has exhausted all of his state remedies for his claims. Thus, this Court will address those claims in sequence.

I.

The petitioner's first claim for relief is that the trial court unconsti-

tutionally deprived him of the allegedly exculpatory and inconsistent grand jury testimony of the three main prosecution witnesses. Prior to trial the petitioner moved for the transcripts of the grand jury testimony of the state's three eyewitnesses to the crime. As the reason for his request the petitioner cited the inconsistencies between the witnesses' deposition testimony and their statements given to the police. The petitioner thus argued that the transcripts were needed to impeach the state's witnesses. The trial court denied the motion and also denied the petitioner's motion for the Court's in camera review of the grand jury transcripts which the petitioner argued was necessary in order to assure the state's compliance with Brady v. Maryland, 373 U.S. 83 (1963).

The petitioner presented this claim to the state courts in his Rule 3.850 motion. However, the state trial court rejected the petitioner's arguments and the Florida Supreme Court affirmed, holding that the petitioner had failed to lay a proper predicate for his motion and that the petitioner's effective use of the

witnesses' inconsistent deposition testimony on cross-examination "obviated the need for their prior [grand jury] testimony."[2] Jent v. State, 408 So.2d 1024, 1027-28.

There is no federal constitutional right to the discovery of grand jury transcripts. See United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). Thus, the only federal issue before this Court is whether the petitioner's rights under Brady v. Maryland supra were violated by the failure of the state trial court to release the grand jury transcripts. Alternatively, this Court must consider whether the failure of the state court to review the transcripts in camera in order to determine whether they contained Brady material violated the petitioner's constitutional rights.

2/ The Florida Supreme Court determined that no violation of the state criminal discovery laws, specifically Fla. Stat. §905.27, occurred due to the trial court's denial of the petitioner's motion for the production of the transcripts. This interpretation of the state law by the highest court of the state is not subject to review under 28 U.S.C. §2254.

The necessity for secrecy of grand jury proceedings precludes the right of unrestricted access to grand jury transcripts. See Douglas Oil Co. v. Patrol Stops Northwest, 441 U.S. 211, 223 (1979). The "indispensable secrecy of grand jury proceedings must not be broken except where there is a compelling necessity" which is shown with particularity. United States v. Proctor & Gamble, supra at 682 (citations omitted). In the instant case the particularized need cited by the petitioner was his desire to more effectively cross-examine the state's witnesses and to determine if the transcripts contained exculpatory information. However, the petitioner was not without resources for impeachment. The petitioner deposed all of the state's witnesses before trial and trial record reveals that the defense extensively cross-examined the state's witnesses regarding their motives for testifying and the inconsistencies between their trial testimony and their deposition testimony. The petitioner's cross-examination of the state's eyewitnesses was unfettered and aided by their inconsistent depositions.

Thus, this Court cannot conclude that the petitioner's particularized need for the transcripts outweighed the need for grand jury secrecy.

The Court also concludes that the petitioner has failed to show with particularity the usefulness or materiality of the grand jury transcripts. The prosecution stated that the transcripts did not contain any exculpatory information. The fact that the grand jury testimony is alleged by the petitioner to contain some inconsistencies does not, without some factual support, convince this Court that the trial court abused its discretion in deciding not to review the transcripts in camera. See United States v. Gonzalez, 466 F.2d 1286 (5th Cir. 1972). Accordingly, the Court DENIES the petitioner's first claim for relief.

II

The petitioner's second claim for habeas relief is based on the trial court's denial of the petitioner's motion for a continuance in order to give defense counsel an opportunity to depose Samantha Carver. Four days before his scheduled

trial, the petitioner subpoenaed Ms. Carver who was an eyewitness to the events surrounding the murder. However, at trial neither the state nor the petitioner called Ms. Carver to testify. Ms. Carver entered into a plea agreement with the state immediately before the petitioner's trial but was not sentenced until after the trial. The petitioner basically argues that he was denied Ms. Carver's allegedly exculpatory testimony because it would have been futile to call Ms. Carver at trial when she would have asserted her Fifth Amendment privilege until after her sentencing. In light of those facts, the petitioner asserts that the trial court's failure to grant the petitioner's motion for a continuance, denied him his Fourteenth Amendment right to "present his own witnesses and establish a defense." Citing Washington v. Texas, 388 U.S. 14, 19 (1967). In support of his claim the petitioner presents the affidavit of Ms. Carver which is exculpatory with regard to the petitioner and not incriminatory with regard to Ms. Carver.

Lying beneath the petitioner's assertions is the fact that the petitioner never did call Ms. Carver to testify. Her affidavit is not incriminating and there is no apparent reason based on that affidavit why Ms. Carver would refuse to testify. Indeed, based on her affidavit there was no reason for Ms. Carver to plead guilty to the charge of being an accessory after the fact to Tammy's murder.[3] Ms. Carver's affidavit states that no murder occurred at the riverside party. The trial court was presented with the petitioner's speculations that Ms. Carver's testimony would be favorable to the petitioner and that she would so testify after her sentencing. However, if Ms. Carver's testimony was to have been consistent with her affidavit, there was no need for petitioner to fear her assertion of the Fifth Amendment. In addition, even if the trial court had continued the trial there was no guarantee that Ms. Carver would not have invoked the Fifth Amendment. Ms. Carver was not given

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3/ For a discussion of the content of the Carver affidavit see note 7 and accompanying text infra.

immunity by the state and double jeopardy would not have prevented her prosecution for other criminal acts surrounding Tammy's murder - including the prosecution for first degree murder. Under these considerations, the trial court was well within its discretion in denying the motion to continue which was based on the petitioner's speculations.[4] Accordingly, the Court concludes that the petitioner suffered no due process violation by the denial of his motion to continue.

4/ At his Rule 3.850 hearing, the petitioner declined to call Ms. Carver as a witness in support of his claims of ineffective assistance of counsel due to counsel's failure to present her testimony and prosecutorial misconduct in connection with the motion for continuance. The respondent thus argues that the petitioner's failure to present Ms. Carver for cross-examination was a deliberate by- pass of a state court proceeding and has resulted in a procedural default on all claims supported by Ms. Carver's testimony. See Wainwright v. Sykes, 438 U.S. 72 (1977). The Court recognizes the persuasiveness of this argument but determined that the petitioner's continuance claim should be dismissed on the merits.

III

The petitioner's third claim for relief alleges that he was denied due process by the trial court's admission into evidence of a hair sample which was identified as the petitioner's. The petitioner first argues that the hair sample was discovered under dubious circumstances. Specifically, three days after the body had been removed, a county homicide detective discovered a clump of hair at the site where the victim's body was found. During that three day period there had been numerous other police investigators in the area. The hairs were sent to the state's crime laboratory in Tallahassee where they were analyzed by the state's hair expert. The crime laboratory concluded that most of the hairs came from the victim. However, the crime laboratory determined that one hair was unidentified. Upon comparison of the unidentified hair and a sample of the petitioner's hair, it was determined that the hair found at the crime scene was microscopically identical to the petitioner's hair. The state's expert so testified at trial. The expert, however,

also testified that hair analysis was not a basis for positive identification and upon cross-examination the expert conceded that the microscopic comparison of hair samples was far from conclusive in this case.

The petitioner presented this claim for relief in his second Rule 3.850 motion and the state court rejected the argument. The Florida Supreme Court found that the trial judge was correct in determining that hair comparison analysis was sufficiently reliable to be admitted into evidence. The Florida Supreme Court based its decision on the fact that the hair expert repeatedly conceded that hair comparison was not absolutely reliable. Thus, the Supreme Court found that it was within the province of the jury to accord whatever weight they felt the hair comparison deserved.

A state court evidentiary error does not justify federal habeas relief unless the error results in the trial's fundamental unfairness. Dickson v. Wainwright, 683 F.2d 348 (11th Cir. 1982). Thus, this Court must examine the petitioner's claim to determine first if

it was an error for the trial court to admit the hair comparison testimony. If the Court finds that it was error to admit the testimony, the Court must then determine whether that error resulted in fundamental unfairness. The erroneous admission of evidence is fundamentally unfair if it was "material in the sense of a crucial, critical highly significant factor" in the defendant's conviction. Id. at 350 (quotations omitted).

The microscopic analysis and comparison of hair samples is an accepted scientific test for use as evidence. See Peck v. State, 395 So.2d 492 (Fla. 1981); United States v. Brady, 595 F.2d 359 (6th Cir. 1979). The petitioner's argument that the microscopic hair comparison is scientifically unreliable is meritless. Although the microscopic hair comparison is not one hundred percent conclusive, it can be relied upon to a relatively high degree of accuracy. Thus, the trial court did not abuse its discretion in recognizing the proven scientific reliability of the test.

However, the petitioner also asserts that the evidence collecting process and

the chain of custody of the hair sample were so inconsistent and unreliable as to render the admittance of the hair sample error. The trial court listened to a proffer of the hair comparison expert's testimony and after hearing argument from both parties concluded that the defendant's objections regarding the evidence collecting process and the hair sample's chain of custody affected the weight of evidence but not its admissbility. As noted by the Florida Supreme Court, a trial judge has wide discretion in admitting evidence and unless there clearly was an abuse of that discretion, the trial court's ruling will not be disturbed. Spinkellink v. State, 313 So.2d 666 (Fla. 1975), cert. denied, 428 U.S. 911 (1976). Most importantly for this Court, a federal court considering a habeas petition will only review a state court's evidentiary rulings to determine if the alleged error was of such magnitude as to deny fundamental fairness to the criminal trial. Nettles v. Wainwright, 677 F.2d 410 (5th Cir., Unit B (1982). In the instant case the trial court, after hearing argument on the issue, concluded

that the alleged problems with hair samples were not sufficient to prevent its introduction. Upon examination of the record this Court concludes that the trial court's admission of the hair comparison was not error and even if it was error to admit the hair comparison, its introduction was not so critical as to deny the petitioner a fundamentally fair trial. Accordingly, the Court finds this claim to be without merit and it is DENIED.[5]

IV

The petitioner's fourth claim for relief is that he was denied due process

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5/ The state produced three eye witnesses who testified that the defendant murdered the victim. Thus, it can not be said that the hair comparison was a crucial piece of evidence which resulted in the petitioner's conviction. The defense extensively cross-examined the prosecution's hair comparison expert and the expert repeatedly conceded the potential flaws in the microscopic testing. In light of the three eye witnesses' testimony and the arguably equivocal nature of the hair comparison, the allegedly erroneous introduction of the hair sample could not have resulted in a fundamentally unfair trial.

of law by the failure of the trial court to define the underlying felony of "sexual battery". Sexual battery is an element of the crime of felony murder which was one of the crimes upon which the trial court instructed the jury. Specifically, the trial court instructed the jury that it could find the petitioner guilty of premeditated murder and/or felony murder. However, the trial court did not instruct the jury as to the definition of the crime of sexual battery which is the underlying felony upon which the jury could have based a verdict of felony murder. A general verdict was used in the petitioner's case and thus it is not possible to be absolutely certain whether the verdict was based on the felony murder instruction or the premeditated murder instruction.

The petitioner did not object to the omission of the underlying felony instruction at trial. Nonetheless the Florida Supreme Court considered this claim on direct appeal. In light of the overwhelming evidence of premeditation and the state's almost total reliance on premeditation in the presentation of the

case and its argument, the Florida Supreme Court found the failure to instruct on the underlying felony to be harmless. See Jent v. State, 408 So.2d 1024, 1031 (Fla. 1981), citing Knight v. State, 394 So.2d 997 (Fla. 1981).

Any petitioner who brings a federal constitutional claim to a federal court after a state procedural default must demonstrate both cause excusing his procedural default and actual prejudice resulting from the alleged constitutional violation before obtaining relief. Wainwright v. Sykes, 433 U.S. 72 (1977). "The failure to object [at trial] generally indicated that defense counsel felt that the trial error was not critical to his client's case; presumably, therefore, the error did not render the trial fundamentally unfair." Engle v. Isaac, 456 U.S. 107, 136, n.1 (1982) (Stevens, J., concurring in part and dissenting in part).

In the instant case the petitioner concededly did not object to the jury instruction and offers no excuse for that default. Thus, under Wainwright v. Sykes,

supra this Court is precluded from considering whether the jury instruction was constitutionally deficient. The Florida Supreme Court did, however, address the merits of the petitioner's claim and although the Court finds that the petitioner procedurally defaulted on his claim, the Court will address the merits of the claim.

The standard of review in a collateral proceeding of an allegedly erroneous jury instruction is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether the instruction is undesirable, erroneous, or even universally condemned. Henderson v. Kibbe, 431 U.S. 145 (1977). As noted by the Florida Supreme Court, the entire thrust of the state's case against the petitioner was premeditated murder. Closing arguments of both counsel were primarily directed towards the premeditated murder charge. Applying the standard articulated in Kibbe, this Court's review of the omitted instruction within the context of the entire trial

leads it to conclude that the omitted instruction did not result in a constitutionally infirm conviction. Accordingly, the petitioner's fourth claim is DENIED as meritless.

V

The petitioner's fifth claim in support of his request for habeas relief is that the trial court failed to instruct the jury on the possibility of considering non-statutory mitigating circumstances at the penalty phase of their deliberations. The trial court instructed the jury that they could consider the mitigating circumstances enumerated in Florida's death penalty statute - Fla. Stat. §921.141. The trial court did not expressly instruct the jury that they could consider non-statutory mitigating factors although the court's instructions did not tell the jury to preclude their consideration. The instructions were silent on the issue.

As with the alleged unconstitutional jury instruction in claim four, the petitioner did not object to the court's sentencing instruction. In fact, the

petitioner's trial counsel explicably stated that he was satisfied with the court's instruction. Thus, the petitioner must demonstrate both cause and prejudice as to the alleged constitutionally infirm jury instructions before he may gain federal habeas relief. See Wainwright v. Sykes, supra.

In evaluating a trial court's instructions, the Court must determine the interpretation a reasonable juror might give the words of the instruction in question. Sandstrom v. Montana, 442 U.S. 510, 514 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury pass constitutional muster. Davis v. McAllister, 631 F.2d 1256, 1260 (5th Cir. 1980), cert. denied, 452 U.S. 907 (1981).

The fundamental issue in this claim is whether the jury that recommended death for the petitioner perceived that they were precluded from considering nonstatutory mitigating factors. The Court is spared an in depth analysis of this issue because the Eleventh Circuit has already considered the identical issue in almost identical circumstances in Ford v. Strickland, 696 F.2d 809, 811-13 (11th

Cir. 1983). In Ford, the Court reviewed a sentencing instruction that like the instant instruction was basically a reiteration of Fla. Stat. §921.141. The Ford Court determined that the statute's failure to explicitly restrict the jury's consideration of nonstatutory mitigating factors when compared to the statute's explicit restriction of aggravating factors would lead a jury to conclude that all mitigating factors, including those outside of the statute could be considered. Ford is indistinguishable from the instant case and for the reasons articulated in Ford, the Court finds this claim of the petitioner to be without merit. Accordingly, it is DENIED.

VI

In his sixth claim for habeas relief the petitioner alleges that misconduct by law enforcement personnel and government prosecutors so pervaded the state's prosecution of the case that he was denied due process. Specifically, the petitioner alleges that the state pressured and frightened witnesses; the state failed to investigate and to disclose to defendant's

counsel evidence that identifies the victim and incriminates another person as the murderer of Tammy; and lastly that the state interferred with defendant's counsel in his defense of petitioner.

The state argues that the petitioner is procedurally barred from asserting his claims of prosecutorial misconduct because he failed to exhaust those claims in the state proceedings. However, it is clear from the trial court's order denying the petitioner's Rule 3.850 motion and the Florida Supreme Court's affirmance of that denial, that the petitioner exhausted at least some of his claims of prosecutorial misconduct which were not addressed on the merits by the state courts. However, the petitioner did present those claims to the state trial court in his three supplemental Rule 3.850 motions. The first of these supplemental motions was filed on July 6, 1983. The second and third supplemental motions were filed on July 12, 1983 - the day of the hearing on the petitioner's Rule 3.850 motion. The trial court refused to allow the amendment of the petitioner's original Rule 3.850 motion and thus did not consider the merits

of the claims contained in the supplemental motions.[6] The state argues that the claims presented in the supplemental motions were not exhausted.

However, as the claims alleged in the supplemental motions were presented to, but not addressed by the state court, this Court holds that the petitioner is not procedurally barred from presenting those claims in this federal action. Cf. Felder v. Estelle, 693 F.2d 549 (5th Cir. 1982) (exhaustion is not a matter of subject matter jurisdiction but exists as a matter

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6/ The trial court in its ruling on the petitioner's Rule 3.850 motion specifically stated:

> The prayer of the defendant for post conviction relief is hereby denied as to those issues raised in those portions of his motion styled "Points 1A, 1B, 1C, 1D" including Points "2" and "3" under "D" (these sections related to petitioner's claim of prosecutorial misconduct). Those issues were all raised and determined on appeal to the Florida Supreme Court and the defendant may not now raise those issues collaterally. (CR.244)

of respect to the state courts, and as such, may be waived); Carr v. State of Alabama, 586 F.2d 549 (5th Cir. 1978) (a federal habeas claim raised but not addressed by the state court is exhausted).

The petitioner asserts a number of facts and factual inferences in support of his allegations of prosecutorial misconduct. Although not presented in this manner by the petitioner, for purposes of clarity the Court has divided the petitioner's broadly stated claims into four separate instances of alleged prosecutorial misconduct. The Court will address each in turn.

1. In the petitioner's first claim of prosecutorial misconduct he notes that the victim was never identified and the state did not attempt to introduce any evidence relating to the identity of the victim at trial. However, the family of a young woman named Gail Bradshaw who had disappeared around the time of the murder and who is still missing, attempted to establish whether or not the victim was Ms. Bradshaw. The Bradshaws contacted the Pasco County Sheriff's Department concerning the possibility of Gail Bradshaw

being "Tammy". The Bradshaws were shown police pictures of Tammy's corpse but were unable to identify "Tammy" as Gail Bradshaw. The state made no mention to the petitioner of the Bradshaw's efforts prior to trial. Besides claiming that the state covered up the Bradshaw's investigation, the petitioner alleges that the state did not fully cooperate in assisting the Bradshaws in their efforts to determine whether the victim was Gail Bradshaw.

Subsequent to trial, the petitioner did learn of the Bradshaw's effort and moved for a new trial based on recently discovered evidence. At the hearing on the petitioner's motion Tommy Bradshaw, Gail's brother, testified that the photograph of the victim and victim's shoes, which had been introduced at trial, bore a resemblance to his sister and her shoes. However, neither Ms. Bradshaw's sister or father could confirm Tommy Bradshaw's identification.

The gravamen of this claim of prosecutorial misconduct is that the respondent suppressed exculpatory information in violation of Brady v.

Maryland, 373 U.S. 82 (1963). However, the fact that her family was looking for the disappeared Gail Bradshaw is not exculpatory. Undisclosed evidence is exculpatory if it creates a reasonable doubt of guilt that did not otherwise exist. United States v. Agurs, 427 U.S. 97 (1976); see also United States v. D'Antignac, 628 F.2d 428 (5th Cir. 1980). Under the standard of Agurs the state was not obliged to inform the defense that a worried family was concerned that the victim may have been their daughter. The petitioner fully presented the Bradshaw's testimony at the hearing on his motion for a new trial and that testimony is inconclusive. Except for Gail Bradshaw's brother, the Bradshaws were unable to positively identify Tammy as Gail. In light of the irrelevance of the identity of the victim to the petitioner's conviction and the overwhelming evidence of guilt, the failure of the state to inform the petitioner of the Bradshaw's inquiries was not a violation of Brady.

2. The petitioner's second claim of prosecutorial misconduct involves the state's alleged bad faith opposition to

the petitioner's motion to continue his trial in order to obtain the testimony of Samantha Carver. The petitioner argues that the State unconstitutionally denied the petitioner an exculpatory witness. In support of this claim in his original Rule 3.850 motion the petitioner submitted the affidavit of Ms. Carver which states that the riverside party occurred on July 11, 1979, not July 12, 1979 and that no murder took place. Ms. Carver also states that she would have testified on behalf of the petitioner but was advised not to testify by her attorney.

While the trial court denied this claim as having been presented to the Supreme Court of Florida on direct appeal, the petitioner couched his Carver claim before the Florida Supreme Court in terms of the trial court's abuse of discretion in denying the motion for a continance and ineffective assistance of counsel in not diligently pursuing the motion. See Jent supra at 1028. However, even when presented in a new theory to this Court, the petitioner's claim based on the failure of Carver to testify cannot stand. The only allegation of prosecutorial misconduct is

that the state offered Ms. Carver a plea bargain and she accepted. Ms. Carver was free to testify at the petitioner's trial but she declined to do so based on the evaluation of her own best interests. There is no prosecutorial misconduct in preventing her testimony.

Even if the Court considered the Carver affidavit new evidence, the petitioner's claim must fail. "[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus." Townsend v. Sain, 372 U.S. 293, 317 (1963). Accordingly, the Court finds this claim of prosecutorial misconduct to be without merit.[7]

7/ The Court notes that Carver's affidavit is inconsistent with her admission that she participated in the murder of Tammy. Carver was sentenced to five years for that participation. Thus, her affidavit that the murder did not occur is irreconcilable with her admission of guilt. Carver explains this inconsistency by stating in her affidavit that she plead guilty to the charge of accessory after the fact to Tammy's murder because the state had threatened to prosecute her with first degree murder.

3. The petitioner's third claim of prosecutorial misconduct alleges that the testimony of the petitioner's cellmate, James Ray Boone, was procurred by prosecutorial misconduct. Boone testified that while in jail the petitioner admitted his participation in the murder. The petitioner alleges that the state elicited Boone's testimony by offers of leniency for Boone's own crime.

The petitioner asserted this ground in his second supplemental 3.850 motion. Thus, as noted, it was not considered on the merits by the state courts. An independent review of the record, however, fails to support the petitioner's allegations. At the petitioner's trial, Boone explicitly testified that he was not expecting leniency in return for his testimony. The petitioner had ample opportuity to cross examine Boone regarding his motivation for testifying. The only basis for the petitioner's claim is that the sentencing court was allegedly informed of Boone's testimony in the petitioner's case. There is no evidence that Boone's sentencing court even considered this fact when sentencing Boone.

In sum, whatever the characterization of the petitioner's alleged facts, they do not rise to the level of a constitutional violation. Accordingly, this claim is without merit.

4. The petitioner's fourth claim of prosecutorial misconduct involves the petitioner's motion for a new trial and a subsequent new development. In preparation for the hearing on his moton for a new trial the petitioner filed the affidavits of Tina Marvin, Gail Bradshaw's friend, and Elmer Carroll. The affiants stated that "Tammy" was actuallly Gail Bradshaw and that Ms. Bradshaw had been beaten, burned and murdered by her boyfriend, Bobby Dodd. The murder allegedly took place in the Richloam Game Preserve on July 12, 1979 - the place and date of Tammy's murder - and was witnessed by Carroll. However, at the hearing on the petitioner's motion both Marvin and Carroll recanted their sensational affidavit testimony. Carroll stated that he was not at the game preserve on July 12, 1979 and that he had not seen anything violent happen to Gail Bradshaw. Corroborating Carroll's recantation, Marvin

stated that Carroll had never told her that Gail Bradshaw was murdered. Upon questioning by the state as to why Marvin had falsely testified in her affidavit, Marvin stated she had done so to help Miller, the petitioner's codefendant.

In support of his first supplemental Rule 3.850 motion the petitioner presented a second Tina Marvin affidavit in which Ms. Marvin reaffirmed her original afidavit testimony, i.e., that Elmer Carroll had told her that Gail Bradshaw had been killed by Bobby Dodd in his presence. Marvin's second affidavit also asserts that immediately prior to the hearing on the petitioner's motion for a new trial state officers had coerced her into repudiating her original affidavit. As noted, the state court did not address the merits of this allegation.

If a state court has not held an evidentiary hearing to develop facts necessary to resolve an issue raised in a habeas petition, a federal court has the duty to conduct such an evidentiary hearing. Guire v. Fortenberry, 661 F.2d 496, 500 (5th Cir. 1981) (en banc). However, if the petitioner failed to

develop those facts through "inexcusable neglect" or a deliberate bypass of the state proceeding then a federal evidentiary hearing is not required. See Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983). "In most cases, a deliberate bypass must itself be proved by an evidentiary hearing." Buckalew v. U.S., 575 F.2d 515, 519 (5th Cir. 1978). The petitioner did not present his first supplemental Rule 3.850 motion and its supporting Marvin affidavit until after the state court had addressed the merits of the petitioner's motion. However, from the record the Court cannot determine whether the petitioner deliberately bypassed the state's post trial procedures. Accordingly, the Court will conduct a hearing on the petitioner's allegations of prosecutorial misconduct with regard to the Marvin - Carroll recantation. However, as a prelude to a hearing on the merits of the claim, the petitioner must first establish that he did not deliberately bypass the state's post trial procedures.

VII

The petitioner's seventh argument in support of relief is that he received unconstitutionally inadequate representation of counsel at trial. The petitioner presented six specific claims of deficiency on the part of his appointed trial counsel in his original petition. These claims are:

(A) Failure to obtain a defense forensic expert on the cause of death;

(B) Failure to obtain a defense forensic expert on the scientific accuracy of the hair comparison;

(C) Failure to obtain an expert on the relation of drug use and witness credibility;

(D) Failure to obtain a second psychiatrist to aid the petitioner's search for mitigating factors and failure to adequately investigate potential mitigating factors;

(E) Failure to object to jury instructions;

(F) Conflict of interest by petitioner's first defense counsel, Jack Hoogewind;

(G) Inadequate cross-examination of the state's witnesses.

The state court conducted a hearing on all of the petitioner's ineffective assistance of counsel claims. The petitioner's trial counsel testified at the hearing and upon consideration the state court rejected the petitioner's claims in a detailed opinion. See Order Denying Motions to Vacate and Motions for Stay of Execution, July 13, 1983. The Florida Supreme Court affirmed that Order. See Supreme Court Per Curiam Opinion.[8]

8/ As noted, the petitioner has moved to hold an evidentiary hearing on all of his claims, including his claims of ineffective assistance of counsel. However, before a federal court must afford an evidentiary hearing on an exhausted state habeas claim the petitioner must allege that a "material" fact was not developed at the state court hearing and that the failure to develop the fact was not attributable to the petitioner's inexcusable neglect or deliberate bypass. Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983).

In the instant case, before ruling on his Rule 3.850 motion, the state court afforded the petitioner a comprehensive hearing on his ineffective assistance of counsel claim. The hearing included the petitioner's presentation of expert testimony. Judge Cobb made detailed findings on the competency of the petitioner's counsel which this Court may adopt without

The Sixth Amendment right to counsel carries with it a corollary that guarantees the right to effective counsel. Washington v. Strickland, 683 F.2d 1243 (5th Cir. Unit B, 1982). A habeas petitioner asserting a claim of ineffective assistance of counsel must prove by a preponderance of the evidence that (1) his counsel was in fact ineffective and (2) that his counsel's ineffectiveness caused "actual and substantial prejudice to his case." Washington supra at 1250; Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Constitutionally effective counsel is not errorless counsel, nor counsel judged ineffective by hindsight but counsel which was reasonably effective as judged by the totality of circumstances in the entire record. Washington v. Watkins,

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affording the petitioner any further opportunity to produce evidence. See Ford v. Strickland, 696 F.2d 809, 825 n.1 (11th Cir. 1983) (Tjoflat, J., concurring). The petitioner does not allege the omission of any material fact from the record. Therefore, as the Court has adopted Judge Cobb's findings of fact, no federal evidentiary hearing is required on the ineffective assistance claim. Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983).

655 F.2d 1346 (5th Cir. 1981).

Where, as in the instant ineffective assistance of counsel claims, there has been a full evidentiary hearing on the merits of the claim, there is a presumption of correctness to the state court's findings. See 28 U.S.C. §2254(d); Sumner v. Mata, 449 U.S. 539 (1981). That presumption can only be rebutted if the petitioner establishes one of seven exceptions to section 2254(d) or if the Court's independent review of the record leads it to conclude that the record when considered as a whole does not fairly support the state court's findings. In his supplemental memorandum in support of his motion the petitioner in a cursory manner lists exceptions (2), (3), (6), (7) and (8) to section 2254(d) as being applicable to this case. The petitioner does not provide details as to what manner the state court's hearing on the ineffective assistance claim was deficient. In his supplemental memorandum, the petitioner in essence argues that the state court was wrong in its conclusions. The petitioner does not argue that the hearing was deficient or that he was not allowed to

produce evidence in support of his claims. See Petitioner's Supp. Memo at 53-58.

The Court's review of the record of the state court's hearing on the petitioner's ineffective assistance claim leads the Court to conclude that none of the section 2254(d) exceptions apply. The petitioner's unsupported claim that the state court hearing was inadequate does not establish an exception to section 2254(d). The petitioner was given unfettered discretion to establish his claim of ineffective assistance at the state court hearing. The petitioner presented the live testimony of his trial counsel, an expert trial attorney and an expert medical examiner. The record indicates that there was virtually no restrictions on the development of the petitioner's claim. Bald assertions without citations to specific instances of deficiency do not establish an exception to section 2254(d). As the petitioner received an adequate hearing, the state court's findings are presumptively correct.[9]

9/ In his pleadings in support of his petition, the petitioner tends to blur his state court claims for ineffective assistance of counsel with those ineffective assistance claims presented in the

In order to overcome that presumption, the petitioner must establish that the state court's findings are "not fairly supported by the record." 28 U.S.C. §2254(d)(8). Under §2254(d), however, the state court findings are entitled to a high measure of deference and "[t]his deference requires that a federal habeas court must more than simply disagree with the state court before rejecting its factual determinations." Marshall v. Lonberger, 103 S.Ct. 843, 850 (1983). Rather, a federal habeas court must defer to state court findings in the absence of convincing evidence to the contrary. Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983).

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instant petition. However, only the six claims of ineffective assistance of counsel presented in the original petition and the one claim of ineffective assistance presented in the amended petition are before the Court. All other claims, including those in the three supplemental Rule 3.850 motions will not be considered as they are not part of the instant petition and amended petition. The six claims of ineffective assistance presented in the original petition were specifically considered by the state court in its hearing on the petitioner's Rule 3.850 motion.

(A) Petitioner's first claim of ineffective assistance of counsel is that trial counsel failed to move for a defense forensic expert on the cause of death. The petitioner supports this claim with the testimony of Dr. Ronald Wright an experienced medical examiner who testified at the state court ineffective assistance hearing that the victim was probably not alive when immolated. Dr. Wright's testimony would arguably have contradicted the testimony of the state's medical examiner - Dr. Nowab. Dr. Nowab testified that the victim was probably alive when burned.

However, at the state court hearing the petitioner's trial counsel testified that he believed the equivocal nature of Dr. Nowab's report was beneficial to the defense. Thus, petitioner's trial counsel made a tactical decision to forego another possibly more prejudicial opinion. In addition, as noted by the state court judge, the medical examiner testified at the petitioner's trial that the victim was unconscious and beyond sensitivity to pain when immolated. Arguably, this fact lessened the heinous nature of the crime.

In reviewing a claim of ineffective assistance of counsel, this Court will not second guess a legitimate tactical decision at trial. Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). Accordingly, this claim is without merit.

(B) The petition next claims that defense counsel was ineffective because he did not obtain a forensic hair expert. However, during the defendant's cross-examination of the state's hair expert the expert repeatedly conceded the non-conclusiveness of the hair comparison. Thus, the petitioner obtained by cross-examination whatever benefit his own hair expert would have provided. Under these circumstances, it is difficult to see how the defendant's counsel's failure to retain a hair expert was ineffective let alone establish "actual and substantial prejudice to his case." Washington supra at 1250.

(C) The petitioner's third claim of ineffective assistance stems from his trial counsel's failure to obtain an expert on the effects of drug use on the credibility of a witness or to make a proper investigation into the state's

witnesses' backgrounds. During cross-examination, the defense solicited from the state's three eyewitnesses significant facts concerning both their long term drug usage and their use of drugs and alcohol during the night of the murder. Indeed, the trial record reveals that the defense significantly impeached the state's three eyewitnesses. After cross-examination none of the state's eyewitnesses looked like either model citizens or clear eyed, sober witnesses. In view of defense counsel's success in attacking the credibility of these witnesses the Court is unsure what benefit an expert would have added to that attack. In short, the Court can not conclude that defense counsel was ineffective because of his failure to retain an expert on drug usage. Even if defense counsel was ineffective, the Court can see no prejudice inuring to the petitioner because of the deficiency. As to defense counsel's failure to investigate the witnesses' background, the petitioner has made no showing that defense counsel failed to properly investigate nor that the petitioner was prejudiced because of an inadequte investigation. Unsupported

allegations do not give rise to grounds for habeas relief. Dickson v. Wainwright, 683 F.2d 348, 351 (11th Cir. 1983).

(D) The petitioner's fourth claim of ineffective assistance relates to defense counsel's failure to request an independent psychiatric examination of the petitioner and to defense counsel's failure to obtain character witnesses for the petitioner. Prior to trial the trial judge refused to pay for a private psychiatrist to examine the petitioner in his search for mitigating factors. The trial court did offer to provide the petitioner with the services of a court appointed psychologist. However, the petitioner refused the services of the court appointed psychologist.

As the court appointed psychologist found codefendant Miller to have acted under the influence of the petitioner, the Court can see why the petitioner did not want to be examined by that particular psychologist. However, once again the petitioner does not specifically state how a privately retained psychologist would have aided him. The petitioner had the opportunity to present evidence on point

but declined to call a psychiatric witness in support of this claim at his Rule 3.850 hearing. As with the petitioner's third claim of ineffective assistance of counsel, speculative prejudice can not sustain a finding of constitutionally deficient counsel. See Dickson v. Wainwright, 683 F.2d 348, 351 (11th Cir. 1983).

The petitioner also claims that his trial counsel did not obtain character witnesses in mitigation of his sentence. However, the Court notes that trial counsel did discuss with the petitioner the use of mitigation witnesses. Therefore, at a minimum trial counsel was aware of the possibility of their use. While the Court will not speculate on the reason that no character witnesses were presented during the sentencing phase of the petitioner's trial, the Court notes that the petitioner did not present any such character witnesses at his Rule 3.850 hearing. As the burden is on the petitioner to show both counsel's ineffectiveness and resulting prejudice, the Court concludes that with regard to the character witness claim, the petitioner

has failed to establish either of his burdens.

(E) Petitioner's fifth claim of ineffective assistance of counsel relates to trial counsel's failure to object on two occasions to the court's allegedly erroneous instructions to the jury. The allegedly erroneous instructions concerned the failure to define sexual battery as the underlying felony in the felony murder charge and the sentencing instruction on mitigating factors which allegedly limited the jury's consideration to only statutory mitigating factors. The Court has previously considered the substance of the petitioner's arguments relating to the unconstitutionality of these instructions and found them to be meritless. As the Court found the instructions to be constitutionally sufficient there can be no Sixth Amendment violation because of trial counsel's failure to object to them.

(F) In the petitioner's sixth claim of ineffective assistance of counsel, he alleges that his initial attorney in the case, Jack Hoogewind, had a conflict of interest with the petitioner's representation because Mr. Hoogewind

simultaneously represented Ray Boone. At trial Boone testified against the petitioner. However, the record reflects that Mr. Hoogewind represented Mr. Boone in a case totally unrelated to the petitioner's case after the state listed Mr. Boone as a witness. Thus, the petitioner has not shown that "his counsel actively represented conflicting interests" as required under Cutler v. Sullivan, 446 U.S. 335 (1980). Accordingly, this claim is without merit.[10]

(G) In his first amendment to his petition the petitioner alleges another claim of ineffective assistance of counsel - that trial counsel's cross-examination of the state's witnesses was constitutionally infirm. Supporting this claim is the affidavit of Richard A. Givens, an experienced trial lawyer who has published treatises on trial advocacy. However, in contrast to Mr. Givens after-

10/ The original petition presents this claim both as an instance of ineffective assistance of counsel and as a separate due process claim. See original petition at 5 and 48. However, although the Court treats this allegation as an ineffective assistance claim, the allegation would also be denied if considered as a separate due process claim.

the-fact conclusions regarding the petitioner's trial counsel's cross-examination, the state trial judge who presided during the entire trial and post trial proceedings found that "text book cross-examination" had been conducted by petitioner's trial counsel. This Court's independent review of the record leads to the conclusion that the state judge's conclusion is correct and much more than "fairly supported by the record". See 28 U.S.C. 2254(d)(8). Accordingly, the petitioner's claim is without merit.

VIII

In the petitioner's eighth claim for relief, also asserted in his first amended petition, the petitioner alleges that his constitutional right to a fair trial was violated because the trial judge was biased in his consideration of the petitioner's claims of ineffective assistance of counsel. As proof of the trial judge's bias the petitioner recites the trial judge's adverse rulings against the petitioner. The petitioner presented this argument to the Florida Supreme Court where it was denied. In order to rise to a constitutional violation, the alleged

bias and prejudice of a judge must stem from an extrajudicial source and result in an opinion on the merits resting on a basis other than what the judge learned from his participation in the case. United States v. Grinnell Corp., 384 U.S. 563 (1966). The petitioner does not cite any extrajudicial basis for the trial court's alleged prejudice. The Court upon its independent review of the record can point to no instance where the trial court even inferentially displayed bias toward the petitioner. As such, the petitioner's claim is without merit.

In conclusion, for the reasons stated in this Memorandum of Decision, the Court DENIES the instant petition in its entirety except for the petitioner's allegations of prosecutorial misconduct regarding the Marvin - Carroll recantations.

DONE AND ORDERED in Chambers at Tampa, Florida, this 30th day of April, 1984.

George C. Carr /s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EARNEST LEE MILLER,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, et al.,

Respondents.

MEMORANDUM OF DECISION

This cause comes before the Court pursuant to petitioner's 28 U.S.C. §2254 petition. The petitioner has been sentenced to death and was scheduled for execution on July 19, 1983. The original habeas petition was filed on July 14, 1983 and, by necessity, this Court stayed the scheduled execution in order that the petitioner's claims might be fully considered. All claims are now exhausted and the parties have completely briefed their respective positions.

FACTS SURROUNDING THE OFFENSE

On July 13, 1979, the badly burned body of a still unidentified young woman was found in a Pasco County game preserve. Six weeks later an indictment was issued by the grand jury charging the petitioner and his stepbrother, William Jent, with premeditated murder. The petitioner and his stepbrother were convicted of first degree murder in separate trials.

The main evidence against the petitioner came from two eye witnesses to the crime - Carlena Jo Hubbard and Glenna Frye. These witnesses testified that they were part of a group of eight people who had gathered for a party near a swimming hole on the Withlacoochee River in Pasco County. All those attending the party had been drinking to various degrees and there was some use of drugs. During the party the victim - tentatively identified during the trial as "Tammy" - arrived at the

scene by some unknown means. Tammy began fighting with one of the group - Samantha Carver. Co-defendant Jent pulled Carver off of Tammy and began to beat Tammy with his fists. The petitioner joined in the beating which became increasingly vicious. Using a stick, the petitioner then beat the victim into unconsciousness.

The petitioner and Jent placed the victim in the trunk of the petitioner's car and returned to the petitioner's house. Tammy was taken out of the trunk and raped on the back of the trunk by the four men in the group, including the petitioner and Jent. The two testifying eyewitnesses watched the rape.

After the rape the victim was placed back in the trunk of the car and the entire group except for one member drove to the game preserve. The petitioner and Jent took the victim out of the trunk and laid her on the ground. The petitioner

then poured gasoline on the victim and set her on fire.

PROCEDURAL HISTORY OF THE PETITION

Following a jury trial the petitioner was convicted of first degree murder on November 15, 1979. On advice of his trial counsel, the petitioner did not testify at either the guilt or sentencing phase of his trial. Disregarding the jury's seven to five vote which recommended life imprisonment, the trial judge sentenced the petitioner to death on January 30, 1980.

The petitioner appealed to the Florida Supreme Court which affirmed both the conviction and sentence and subseqently denied the petitioner's request for a rehearing. See Miller v. State, 415 So.2d 1262, (Fla. 1982), cert. denied, 103 S.Ct. 802 (1983).

In March, 1983 the petitioner filed a Motion to Vacate, Set Aside or Correct

Conviction and Sentence pursuant to Fla.R-.Crim.P. 3.850 in the Circuit Court of the Sixth Judicial Circuit for Pasco County, Florida. On June 24, 1983, the trial court denied the petitioner's motion in part but ordered a joint hearing on the petitioner's and his co-defendant's claims of ineffective assistance of counsel. After a July 12th hearing on this issue, the trial court denied the petitioner's Rule 3.850 motion in total. The Supreme Court of Florida on July 18, 1983 affirmed the lower court's denial of the petitioner's Rule 3.850 motion. The Governor of the State of Florida had signed a warrant for the execution of the petitioner on July 19, 1983. Therefore, in order that this Court be given time to review the instant petition, the Court stayed the execution on July 18, 1983 - the day the petition was filed. The petitioner presents six grounds for relief in

his petition. There is no dispute that the petitioner has exhausted all of his state remedies for his claims. Thus, this court will address those claims in sequence.

I.

The petitioner's first claim for relief is that during the sentencing phase of the trial, the trial Court excluded mitigating testimony concerning the petitioner's rehabilitative capacity. The petitioner thus argues that mitigation testimony was unconstitutionally restricted. Citing Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The basis of the petitioner's claim is the trial court's comments prior to the testimony of Dr. Sidney J. Merin, a court appointed psychologist who examined the petitioner. These comments arguably restricted Dr. Merin's

testimony concerning the petitioner's rehabilitative capacity. The petitioner presented this claim to the Florida Supreme Court who found no error due to the purported restriction because the psychologist's testimony was effective in obtaining a jury recommendation of life imprisonment. See Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982).

The legal framework surrounding petitioner's claim was summarized in Lockett v. Ohio, 438 U.S. 586, 604 (1978). The Court stated: "[T]he Eighth and Fourteenth Amendments require that the sentencer, . . . not be precluded from considering, as a mitigating factor any aspect of a defendant's character or record and any of the circumstances that the defendant proffers as a basis for a sentence less than death."

The remarks of the trial court which the petitioner alleges unconstitutionally

restricted the sentencer's consideration of mitigating testimony occurred prior to Dr. Merin's testimony when the trial judge engaged in a colloquy with counsel. That colloquy went as follows:

> MR. HERSCH (petitioner's attorney): His (Dr. Merin's) testimony will specifically go, I believe, and again I'm not acquiescing that he's not allowed to testify, nor am I saying the circumstances are enumerated and I can't go beyond them, but his testimony will fit within one of the mitigating circumstances. . .
>
> THE COURT: He's not gonna testify to rehabilitative capacity of Mr. Miller?
>
> MR. COPE (prosecuting attorney): We haven't had an opportunity to one, either review any written reports or two, have talked to the doctor with reference whatever he would testify to.
>
> THE COURT: Okay. Well, I'll -- we'll consider those objections when they come up.
>
> MR. COPE: Yes, sir.
>
> MR. HERSCH: I believe he would, in fact, testify to rehabilitative capacity. I believe it may fall within Subsection F (of the Florida statutory mitigating factors). I am indicating to the Court that specifically some of his testimony will fall under Subsection F of mitigation, Subsection E of

duress or substantial domination of another person and I think that incumbent in those two, E and F, he's going to analyze the defendant's character, I would imagine pursuant to the testing he gave.

THE COURT: Okay. Mr. Hersch, I'm gonna find that F in the statute does not encompass rehabilitative capacity of the defendant.

MR. HERSCH: Yes, sir.

THE COURT: I'm not -- we can -- that will have to do. I'm not suppressing any of his testimony because I don't know what it will be. Okay?. . .

Trial Record (hereinafter TR) at 1545-56.

RECESS

THE COURT: Anything before we call the jury back in, gentlemen?

MR. COPE: If defense is gonna put on Doctor Merin I'm gonna ask for a proffer.

THE COURT: Why is that?

MR. COPE: I've never read or received a written report. I've never, but for about two, three, maybe four minutes in the Court chambers today had the opportunity to talk to him and that conversation had to be interrupted. I don't have a complete review or any conversation of what he's gonna say.

THE COURT: I'll deny the request, Mr. Cope. We're gonna go ahead with him. The rules of Court will stand,

however, that he's not to discuss rehabilitative capacity.

MR. COPE: Is the Court gonna instruct the witness to that?

THE COURT: Mr. Hersch, I assume, will do that. If he does, you can object.

MR. COPE: I've observed Doctor Merin testify numerous times. When he starts speaking, he goes.

THE COURT: You can stand up and object. Court maybe can stop him.

TR at 1567-68.

Whatever the interpretation given by the parties to this colloquy, the record evidences that Dr. Merin gave unfettered and detailed testimony concerning the petitioner's chameleon like personality - i.e., that the petitioner would take on the characteristics of those people that he was immediately associated with. Specifically, Dr. Merin testified: "[I]f he (the petitioner) surrounds himself with a group of ministers or clergymen or chaplains or professors and so on, he would take on the charactertistics of that

particular group." TR. at 1591. Dr. Merin then elaborated at great length on this aspect of the petitioner's personality. During the course of Dr. Merin's testimony the state made one non-related objection to the relevancy of that testimony. The trial court overruled the objection. Thus, during both direct and redirect examination, the petitioner conducted a basically unrestricted examination of Dr. Merin.

The sole support for the petitioner's allegations of trial court restrictions on mitigating testimony comes from those portions of the trial court's colloquy where the judge stated that "he's (Dr. Merin) not to discuss rehabilitative capacity." However, the trial court also stated that he would preserve a ruling on any objections that the prosecutor had until presentation of the actual testimony.

Despite the alleged restriction, Dr. Merin testified extensively and favorably from the petitioner's perspective. From a review of the trial transcript it appears that while the trial judge may have made a statement that testimony relating to rehabilitative capacity would be restricted, it is obvious that Dr. Merin did testify about the petitioner's rehabilitative capacity.

The Court reaches this conclusion in part through an analysis of the totality of Dr. Merin's testimony. Specifically, after reading the trial transcript the Court is struck by the question of what additional favorable testimony could have been presented by Dr. Merin regarding the petitioner's psychological make-up or rehabilitative capacity. It does not take a quantum leap of logic to recognize that Dr. Merin thought that the petitioner had a good chance for rehabilitation if placed

in a benign environment. Dr. Merin implicitly stated that proposition. The trial court, the ultimate sentencer in this case heard Dr. Merin's testimony and gave it due consideration. Although restricted in theory, in reality there was no restriction on the mitigating evidence in the form of Dr. Merin's testimony on rehabilitative capacity.[1] Accordingly, there was no Lockett or Eddings violation and this claim will be dismissed.

II.

The petitioner's second claim for

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[1] Apart from all the legal argument that the petitioner asserts in support of this claim, the petitioner offers no statement from Dr. Merin indicating how his testimony concerning the petitioner's rehabilitative capacity would differ from his testimony already presented. The petitioner does not even speculate as to the nature of Dr. Merin's possibly favorable testimony on rehabilitative capacity. The Court thus finds the conclusion inescapable that Dr. Merin would have nothing else to say other than an elaboration on his previously spoken conclusions.

relief is based on the fact that the jury recommendation of life imprisonment was overturned by the sentencing judge who sentenced the petitioner to death. The petitioner's co-defendant had received a jury recommendation of death. At the combined sentencing hearing, the sentencing judge upon review of all sentencing factors and after citing a need for consistency in sentencing, sentenced the petitioner to death. Pointing to the sentencing judge's remarks concerning consistency, the petitioner alleges that his right to an individualized consideration of sentencing factors was violated. Citing Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983); Barclay v. Florida, ____ U.S. ____, 103 S.Ct. 3418 (1983).

A review of the sentencing order reveals that the petitioner is woofully mischaracterizing the basis for the sen-

tencing judge's decision when he states that the sentencing was based solely upon a need for consistency. The sentencing judge noted the burden associated with a judicial overturn of a jury recommendation of life. Citing Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person should differ). Because of the jury's recommendation the sentencing court recognized that it was required to give "greater weight" to the mitigating circumstances found applicable. See Beckren v. State, 355 So.2d 111 (Fla. 1978).

The sentencing judge found that two statutory aggravating circumstances were present in the petitioner's case. The first was that the murder was especially

heinous, atrocious and cruel. See Fla. Stat. §921.141(5)(h). The second was that the crime was committed by Miller in a cold, calculated and premediated manner without any pretense of moral or legal justification. See Fla. Stat. §921.131(5)(i).[2]

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[2] There is some confusion as to the number of statutory aggravating circumstances found by the sentencing judge. In his oral findings entered at the sentencing hearing, the judge after discussing the particularly brutal nature of the crime stated that he found the aggravating circumstances listed in Fla. Stat. §§921.141-(5)(h) and (5)(i) to overlap. Consequently, the court stated that it "is only going to consider those last two [aggravating circumstances] as one aggravating circumstance. TR. at 550.

However, in his written sentencing order after noting the comparability of section (5)(H) and (5)(i), the court nevertheless found both aggravating circumstances to exist. Thus, notwithstanding the court's pronouncements at the hearing, its formal order takes precedence. See Osaka Stosen Kaisha, LTD v. Angelos, Leibek & Co. LTD., 301 F.2d 59 (4th Cir. 1962) (written findings supercede arguably inconsistent oral findings). Accordingly, based on the court's written sentencing order the Court finds that two aggravating circumstances were present in the petitioner's

Counterbalancing these two aggravating factors, the sentencing judge found one statutory mitigating factor - that Miller did not have any significant history of prior criminal activity. See Fla. Stat. §921.141(6)(a). The sentencing judge also noted Dr. Merin's testimony that the petitioner was a social follower. However, the sentencing judge did not find that fact to be mitigating because there was no evidence that the petitioner acted under the domination of his co-defendant.

The sentencing judge carefully weighed the aggravating and mitigating factors and determined that due to the heinous nature of the crime and the petitioner's participation in it, a death sentence was warranted. The petitioner and his co-defendant were found to have been equally culpable and to have attemp-

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sentencing.

ted "to outatrocity the other in killing this girl." Written Sentencing Findings at 4. Because the two co-defendants were jointly sentenced, the sentencing order tends to interchangeably discuss the petitioner's and co-defendant Jent's sentencing considerations. However, this joint discussion and the judge's remarks concerning the injustice of a disparate sentence for two equally participating defendants does not mean that the petitioner did not receive an individualized sentencing consideration. The written sentencing findings reveal that the judge individually considered the petitioner's sentence and found that his participation in the crime merited death. In sum, a neutral review of the record and the sentencing order leads to the conclusion that there was no constitutional violation. Accordingly, this claim will be dismissed.[3]

III.

In the petitioner's third claim for relief he alleges that the sentencing judge impermissibly considered nonrecord evidence. Specifically, the petitioner alleges that the trial court based its finding that the crime was committed in a cold, calculated and premeditated manner on evidence presented at co-defendant Jent's trial that the victim tried to get up before being immolated. No such evidence was presented at the petitioner's trial. The petitioner argues that this alleged consideration of nonrecord

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3 The petitioner also argues that the judicial override of the jury's recommendation of life is by itself unconstitutional when one or more mitigating circumstances are found. However, the Supreme Court in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983), implicitly upheld the constitutionality of Florida's judicial override. The Supreme court is at this time specifically considering the question in Spaziano v. Florida, Case No. 83-5596, cert. granted, 52 U.S.L.W. 3540 (1984). The Spaziano decision should be released sometime during the summer of 1984. In the interim, Barclay controls.

evidence violated his constitutional right to due process. Citing Gardner v. Florida, 430 U.S. 349 (1977).

A review of the sentencing order reveals that the judge arrived at his conclusion that the petitioner committed the crime in a cold and calculating manner without considering that testimony which was only produced in the Jent trial. The court stated:

> Counsel for the defendant argued that the defendants must have thought the girl was dead following the first beating on the bank of the Withlacoochee River and that the remainder of their atrocities were seemingly committed on a lifeless corpse. However, even ignoring the testimony during the trial of the defendant Jent that the girl tried to sit up after gasoline was poured on her, but before she was ignited, this Court cannot believe these defendants could for over an hour drag this girl in and out of automobiles, strip her clothes from her body and each rape her while she was lying on the trunk of an auto without realizing that she was warm, flexible and alive.

Written Sentencing Findings at 2-3.

A review of the record in the peti-

tioner's case reveals that the sentencing judge had ample evidence upon which he could base his finding that statutory aggravating circumstances existed apart from the evidence exclusively presented in the Jent case. The sentencing order explicitly notes that a finding of statutory aggravating circumstances existed without the evidence relating to the victim's attempt to get up. The written sentencing order is not a disclaimer of the court's oral order as characterized by the petitioner. The written order is an elaboration on the sentencing judge's conclusion expressed in the oral order that whether the victim was conscious or unconscious at the time of the burning, the petitioner acted in a cold and calculated manner.

It is presumed that when a judge acts as a finder of fact he will ignore inadmissible evidence when making decisions. Harris v. Rivera, 454 U.S. 339 (1981).[4]

Thus, even without the written sentencing order the presumption is that the sentencing court acted in a constitutional manner. The petitioner has produced no evidence to rebut that presumption and indeed the evidence clearly points to the contrary. Accordingly, there is no Gardner violation and this claim will be dismissed.

IV.

The petitioner's fourth claim is that he was unconstitutionally denied access to the grand jury testimony of the state's two eyewitnesses to the crime - Glenna Frye and Carlena Hubbard. The petitioner

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[4] The Court has previously noted in this Memorandum of Decision that written findings take precedence over oral findings. See note 2 supra. Thus, the basis for the determination of whether constitutional error was committed in sentencing is the written sentencing findings. Those findings clearly show that the Jent evidence was not considered in the petitioner's sentencing.

avers that as his trial strategy was based on attacking the credibility of the state's witnesses, the possibly exculpatory evidence contained in the grand jury transcripts should have been made available. Citing Davis v. Alaska, 415 U.S. 308 (1974). The Florida Supreme Court affirmed the decision of the trial court to neither release nor review the transcripts based on the Supreme Court's reasoning in the appeal by petitioner's co-defendant. See Miller v. State, 415 So.2d 1263, n.3, citing Jent v. State, 408 So.2d 1024 (Fla. 1981) cert. denied, 102 S.Ct. 2916 (1982).

In reviewing co-defendant Jent's section 2254 petition, this Court has also considered the identical claim of constitutional deprivation because of the trial court's refusal to release the grand jury transcripts of Ms. Frye and Ms. Hubbard.[5] See Jent v. Wainwright, Case

No. 83-860-Civ-T-13. (Memorandum of Decision dated April 30, 1984). The petitioner does not assert any different facts or legal theories from his co-defendant. Accordingly, for the reasons stated in the Court's Memorandum of Decision in Jent v. Wainwright, this claim of petitioner will be dismissed.

V.

The petitioner's fifth claim for relief is that he received unconstitutionally inadequate representation of

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5 At the petitioner's trial the only eyewitnesses the state called were Ms. Frye and Ms. Hubbard. Another eyewitness to the crime, Patricia Tirikaine, testified at the trial of co-defendant Jent but did not testify at the petitioner's trial. However, all three witneses were named in the state's witness list in the petitioner's trial. Other than the fact that Ms. Tirikaine was not called to testify, there is no substantive difference in either the facts or the underlying legal theory regarding the petitioner's claim for relief based on the denial of his request for the grand jury transcripts and the identical claim of co-defendant Jent.

counsel at trial. In the amendment to his habeas petition the petitioner presents four specific claims of deficiency on the part of his appointed trial counsel.[6] These claims are:

A. Failure to obtain a defense forensic expert on the cause of death;

B. Failure to renew motion for appointment of investigator;

C. Ineffective implementation of chosen trial strategy;

D. Failure to investigate alternative lines of defense.

The state court conducted a joint

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[6] The petitioner filed his original petition and an amendment to the petition on July 14, 1983. On that date the Florida Supreme Court was still considering some of the petitioner's Rule 3.850 Fla.R. Crim.P. claims. Thus, those claims were unexhausted. Anticipating the denial of those claims by the Florida Supreme Court, the petitioner filed the amendment to the petition prior to the Supreme Court's decision on July 18, 1983. The petitioner's claims contained in his amendment to the petition are consequently ripe for this Court's review.

hearing on all of the petitioner's and his co-defendant's ineffective assistance of counsel claims.[7] The state court denied those claims in a written order entered on July 13, 1983. The Florida Supreme Court affirmed that Order.[8]

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[7] The state court order denying the petitioner's ineffective assistance of counsel claims lists three specific claims that were presented. The instant petition contains four ineffective assistance claims and thus it would appear that one federal claim was not exhausted. However, the instant claims are merely more detailed versions of those claims presented in the Rule 3.850 motion. Thus, the Court finds that the claims have been exhausted and are properly submitted to this Court.

[8] The petitioner has moved to hold an evidentiary hearing on all of his claims, including his claims of ineffective assistance of counsel. However, before a federal court must afford an evidentiary hearing on an exhausted state habeas claim the petitioner must allege that a "material" fact was not developed at the state court hearing and that the failure to develop the fact was not attributable to the petitioner's inexcusable neglect or deliberate bypass. Thomas v. Zant, 697 F.2d 977, 986 (11th Cir. 1983).

In the instant case, before ruling on his Rule 3.850 motion, the state court afforded the petitioner a comprehensive hearing on his ineffective assistance of

counsel claim. The hearing included the petitioner's presentation of expert testimony. The trial judge made detailed findings on the competency of the petitioner's counsel which this Court may adopt without affording the petitioner any further opportunity to produce evidence. See Ford v. Strickland, 696 F.2d 809, 825 n.1 (11th Cir. 1983) (Tjoflat, J., concurring).

The petitioner, however, alleges that evidence necessary to develop his claim of ineffective assistance concerning trial counsel's alleged failure to obtain a defense forensic expert on the cause of death was inadvertently unavailable at the Rule 3.850 hearing. Specifically, the petitioner claims that only inadequate black and white photographs of the victim's corpse were available to Dr. Wright - the petitioner's expert medical examiner. Petitioner's counsel has supplied an affidavit explaining the reason for the lack of color photos. Significantly, however, the petitioner does not state how color photographs would have aided Dr. Wright's testimony. In light of the beneficial nature of Dr. Wright's testimony, the Court cannot conceive how color photos would have added to that testimony. Upon the discovery of the alleged inadequacy the petitioner made no protest nor made no motion for a continuance. Appeals Record (hereafter AR) at 944. A review of Dr. Wright's testimony reveals that while learned, it noted the possibility of different opinions both as to cause of death and whether the victim was alive when burned. In any event due to the nature of the Court's resolution of this claim, there is no need to rehear Dr. Wright's

carries with it a corollary that guarantees the right to effective counsel. Washington v. Strickland, 683 F.2d 1243 (5th Cir. Unit B, 1982). A habeas petitioner asserting a claim of ineffective assistance of counsel must prove by a preponderance of the evidence that (1) his counsel was in fact ineffective and (2) that his counsel's ineffectiveness caused "actual and substantial prejudice to his case." Washington supra at 1250; Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983). Constitutionally effective counsel is not errorless counsel, nor counsel judged ineffective by hindsight but counsel which was reasonably effective as judged by the totality of circumstances

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testimony. See test infra at 19-22.

The petitioner does not allege any other material omissions of fact. Therefore, as the Court has adopted the state judge's findings of fact, no federal evidentiary hearing is required on the ineffective assistance claim. Schultz v. Wainwright, 701 F.2d 900, 901 (11th Cir. 1983).

in the entire record. Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981).

Where, as in the instant ineffective assistance of counsel claims, there has been a full evidentiary hearing on the merits of the claim, there is a presumption of correctness to the state court's findings. See 28 U.S.C. §2254(d); Sumner v. Mata, 449 U.S. 539 (1981). That presumption can only be rebutted if the petitioner establishes one of seven exceptions to section 2254(d) or if the Court's independent review of the record leads it to conclude that the record when considered as a whole does not fairly support the state court's findings. In his supplemental memorandum in support of his motion the petitioner implicitly argues that exceptions (2), (3) and (6) to section 2254(d) are applicable in his case.[9]

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[9] Section 2254(d) provides:

In any proceeding instituted in a federal court by an application for a writ

However, the petitioner offers only one instance where an allegedly material fact was not considered by the state court. Specifically, the petitioner avers that the inadequacy of the black and white photographs of the victim's corpse prevented a complete evaluation of the cause of death by his expert medical examiner, Dr. Ronald Wright. Petitioner's counsel had three months notice of the hearing on petitioner's Rule 3.850 motion but only

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of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction in a proceeding to which the applicant for the writ and the State ... were parties, evidenced by a written finding, or written opinion, ... shall be presumed to be correct, unless the applicant shall establish ... -

(2) that the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the state court hearing;

(6) that the applicant did not receive a full, fair, and adequate hearing in the state court proceeding.

discovered on the day of the hearing that petitioner's trial counsel possessed only allegedly inadequate black and white photographs of the corpse. The original color photographs were in the possession of the Florida Supreme Court. However, as discussed in note 8 supra the Court does not find the absence of color photographs to have resulted in an excused material deficiency in the state court hearing.

Reading the record of the state court's Rule 3.850 hearing as a whole, it is obvious that the hearing was comprehensive and unfettered. The petitioner was given complete discretion to establish his claim of ineffective assistance at the state court hearing. The petitioner presented the live testimony of his trial counsel, Larry Hersch, an expert trial attorney, Paul Kanarek, and Dr. Wright. The record indicates that there was virtually no restrictions on the deve-

lopment of the petitioner's claim. As the petitioner received an adequate hearing, the state court's findings are presumptively correct.

In order to overcome that presumption, the petitioner must establish that the state court's findings are "not fairly supported by the record." 28 U.S.C. §2254(d)(8). Under §2254(d), however, state court findings are entitled to a high measure of deference and "[t]his deference requires that a federal habeas court must more than simply disagree with the state court before rejecting its factual determinations." Marshall v. Lonberger, 103 S.Ct. 843, 850 (1983). Rather, a federal habeas court must defer to state court findings in the absence of convincing evidence to the contrary. Rushen v. Spain, ___ U.S. ___, 104 S.Ct. 453 (1983).

Petitioner's first claim of ineffec-

tive assistance of counsel is that trial counsel failed to move for a defense forensic expert on the cause of death. The petitioner supports this claim with the testimony of Dr. Wright, an experienced medical examiner. Dr. Wright testified at the state court ineffective assistance hearing that the victim was probably not alive when immolated and that the cause of death could have been strangulation. Dr. Wright's testimony would arguably have contradicted the testimony of the state's medical examiner - Dr. Nowab. Dr. Nowab testified that the victim was probably alive when burned and that burning was the cause of death.

Notwithstanding Dr. Wright's speculations, at the state court hearing the petitioner's trial counsel testified that he believed the equivocal nature of Dr. Nowab's report was beneficial to the defense. Thus, petitioner's trial counsel

made a tactical decision to forego another possibly more prejudicial opinion. In addition, as noted by the state court judge, the medical examiner testified at the petitioner's trial that the victim was unconscious and beyond sensitivity to pain when immolated. Arguably, this fact lessened the heinous nature of the crime. The petitioner's attorney thought that another opinion could have decreased the value of this arbuably beneficial testimony. In reviewing a claim of ineffective assistance of counsel, this Court will not second guess a legitimate tactical decision at trial. Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). Accordingly, this claim is without merit.

In a broad case, the petitioner's second, third and fourth claim of ineffective assistance of counsel stems from his trial attorney's alleged failure to ade-

quately investigate the case. More specifically, the petitioner's second claim of ineffective assistance is that his trial counsel was incompetent for not renewing his motion for the appointment of an investigator. The petitioner's third claim is that his trial counsel ineffectively implemented his chosen trial strategy by not conducting adequate cross examination of the state's witnesses. The fourth claim alleges trial counsel's failure to investigate alternative lines of defense.

The evidence produced by the petitioner in support of his allegations of counsel's inadequate investigation consists solely of the testimony of Paul Kanarek, a trial attorney experienced in capital cases, Mr. Kanarek obtained most, but not all, of the petitioner's trial attorney's files the night before the hearing on petitioner's motion. Mr.

Hersch's files were disorganized due to his preparation of the direct appeal of petitioner's case, never talked to Mr. Hersch and admittedly did not read all of Mr. Hersch's notes nor listen to tape recordings of witness depositions.

The petitioner briefly put his trial counsel on the stand. AR 1030-1043. The bulk of Mr. Hersch's testimony relates to his perceptions and actions concerning the medical examiner's findings. As discussed previously, Mr. Hersch effectively explained his strategy concerning the medical examiner. Perhaps because Mr. Hersch's before the fact perceptions would refute Mr. Kanerek's after the fact condemnation of Mr. Hersch's actions, the petitioner did not ask Mr. Hersch any questions concerning the extent, effort or theoretical approach to his pre-trial investigations. Thus, the only evidence before this Court supporting the

petitioner's allegations of inadequate investigation is the testimony of one lawyer. That testimony is based on an extremely hurried, perhaps more accurately stated, frantic review of the incomplete record of the trial attorney. Without either talking to the trial attorney or reviewing the court file, Mr. Kanarek arrived at a conclusion that the trial attorney conducted the case in an incompetent manner.

Opposing Mr. Kanarek's testimony is the findings of the trial judge. Although there was some dispute at the hearing over whether Mr. Kanarek had sufficient expertise to judge the competency of Mr. Hersch, there is no doubt that the trial judge is capable of making that determination. In contrast to Mr. Karanek, the trial judge viewed Mr. Hersch's preparation and performance during the pre-trial, trial, and sentencing

proceeding and post trial. In ruling on the petitioner's motion with relation to the instant claims, the state court found:

> 2. Defendent [sic] failed to show that trial counsel were ineffective in pursuing their motions for funds to hire an investigator or to conduct effective cross examination themselves. In fact, the pre-trial depositions and the trial transcript show conclusively that both trial counsel were well prepared and far above average in their cross-examination of all of the eyewitnesses.
>
> 3. Defendant failed to show that the failure of trial counsel to present evidence to rebut the testimony about "jail house" confessions was anything but good tactical decisions.

Trial court's Order of July 18, 1983 at 4, AR at 1167.

It goes almost without saying that the trial judge was better able than Mr. Kanarek to render an opinion on the competency of Mr. Hersch. Thus, in the absence of convincing evidence to the contrary, this Court must defer to the state court's findings. See Rushen supra. Accordingly, without specifically addressing each facet

of petitioner's ineffective assistance claims, they will be DISMISSED.

VI.

The petitioner's sixth claim for habeas relief based on allegations of prosecutorial misconduct is virtually identical to co-defendant Jent's sixth claim of relief.[10] The Court has considered and dismissed with one exception the allegations of prosecutorial misconduct contained in the Jent petition. See Jent Memorandum of Decision at 20-26. For the reasons stated in the Court's Memorandum of Decision in the Jent petition, all of petitioner's allegations of prosecutorial misconduct with the one exception

[10] Co-defendant Jent's claim of prosecutorial misconduct contains allegations of coerced inculpatory testimony by Jent's cellmate - James Ray Boone. The petitioner's claim does not contain such an allegation. However, with the exception of the inclusion of the Boone allegation, Jent's petition is identical to the petitioner's.

discussed below will be dismissed.

As noted by the petitioner, the most egregious of the allegations of prosecutorial misconduct are that the State threatened witnesses Tina Parsons and Elmer Carroll into recanting their exculpatory testimony. After considering this claim in the Jent petition, this Court concluded that an evidentiary hearing was necessary in order to allow the petitioner an opportunity to substantiate his claim. Accordingly, for the reasons stated in the Court's Memorandum of Decision in the Jent petition, an evidentiary hearing will be conducted at the same time and under the same requirements as outlined in the Jent Memorandum of Decision. See Jent Memorandum of Decision at 24-26.

In conclusion, with the exception of the one claim of prosecutorial misconduct outlined above, the instant petition will be DISMISSED.

DONE AND ORDERED in Chambers at Tampa, Florida, this 30th day of April, 1984.

George C. Carr /s/
UNITED STATES DISTRICT JUDGE

MILLER v. WAINWRIGHT

Earnest Lee MILLER,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; Richard Dugger, Superintendent Florida State Prison, Starke, Florida; and Jim Smith, Attorney General of the State of Florida, Respondents-Appellees.

William Riley JENT,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary Florida Department of Offender Rehabilitation; Charles G. Strickland, Jr., Superintendent of Florida State Prison, Starke, Florida; and Jim Smith, Attorney General of the State of Florida, Respondents-Appellees.

Nos. 85-3175, 85-3185.

United States Court of Appeals,
Eleventh Circuit

Aug. 14, 1986.

Petitioners sought habeas corpus, challenging state convictions and death sentences for first-degree murder. The

District Court, Tampa, 83-849-Civ-T-13, George C. Carr, J., denied the petitions, and petitioners appealed. The Court of Appeals held that: (1) ineffective assistance of counsel claims had to be reexamined by district court under correct Strickland standard, where federal district court had improperly accorded presumption of correctness to state court's mixed law-fact determination of absence of ineffective assistance; (2) it was incumbent upon some court to review grand jury testimony of eyewitnesses to determine whether petitioners had particularized need sufficient to overcome need for secrecy of grand jury proceedings, where witnesses had testified to two different versions, both under oath; and (3) on claim of improper exclusion of mitigating testimony concerning petitioner's rehabilitative capacity during sentencing proceeding, federal district court had to determine whether state trial judge, in setting death sentence, freely considered rehabilitation to be mitigating factor, not merely whether trial court heard such testimony.

Vacated and remanded.

1. Habeas Corpus §92(1)

Habeas Corpus petitioners' ineffective assistance of counsel claims had to be reexamined by district court under correct Strickland standard, where federal district court had improperly accorded presumption of correctness to state court mixed law-fact determination of absence of ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

2. Grand Jury §41.50(5)

To obtain grand jury testimony, defendant must show particularized need sufficient to justify revelation of generally secret grand jury proceedings.

3. Grand Jury §41.50(5)

Threshold showing needed for in camera review of grand jury proceedings by court to determine their relevance and usefulness to defendant is not as high as that needed for defendant to obtain the evidence.

4. Grand Jury §41.50(10)

Federal district court improperly applied requirement that defendant show particularized need to justify revelation of generally secret grand jury proceeding to habeas corpus petitioners' request that court conduct in camera review of grand jury testimony to determine relevance and usefulness to petitioners, by holding that particularized-need standard had not been met because witnesses had been thoroughly cross-examined with deposition testimony contrary to their trial testimony.

5. Grand Jury §41.50(10)

Defendant need not establish what is in grand jury testimony, to avoid rule that such testimony will not be revealed on pure speculation, where it appears clear that the testimony, under oath, is bound to differ from other testimony given under oath.

6. Grand Jury §41.50(10)

It was incumbent upon some court to review grand jury testimony of testifying eyewitnesses to determine whether defendant had particularized need sufficient to overcome need for secrecy of grand jury proceedings, where witnesses' deposition testimony contradicted their trial testimony, making it apparent that grand jury testimony could not agree with both versions testified to by witnesses under oath.

7. Habeas Corpus §92(1)

In considering habeas corpus petitioner's claim of improper sentencing due to exclusion of mitigating testimony concerning petitioner's rehabilitative capacity during sentencing proceeding which led to imposition of death sentence, federal district court had to determine whether state trial judge, in setting death sentence, really considered rehabilitation to be mitigating factor, not merely whether state court heard testimony of rehabilitation.

Appeals from the United States District Court of the Middle District of Florida.

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

Petitioners William Riley Jent and Earnest Lee Miller appeal from the district court's denial of their habeas corpus petitions challenging their state convictions and death sentences for first degree murder. These cases are complicated because of the existence of continuing collateral activities and proceedings in both the state courts, and the federal district court in which these petitions were heard. To consider and finally rule upon all issues raised on these appeals would apparently not finally resolve the question of whether petitioners' death sentences are constitutionally faulty, but would amount to nothing more than the kind of piecemeal litigation which the judicial system tries to avoid. As a matter of fact, a motion was filed with this Court asking that the Jent appeal be abated until either the appeal is mooted by the grant of relief by either the state or district court on other points not asserted on the appeal, or an appeal from a denial of those other claims can be

consolidated with this appeal. Since oral argument, the Court notes that some of the witnesses have allegedly recanted their testimony,[1] the prosecutor's investigation files have been opened by a court order,[2] and the state has now conceded the identity of the victim which was an issue at the time of their petitions.[3] Although none of this is inappropriate for this Court to recognize that there can be no finality in a decision based on what is officially before it.

These cases have been fully briefed and argued, however, and it is clear to us that the district court used the wrong legal standard in considering three different claims. As a matter of judicial efficiency, therefore, it seems appropriate for us to point these matters out to the district court, and remand these cases for reconsideration under the correct standards. All the other issues will then

1. St. Petersburg Times, August 1, 1986.

2. The Tribune Co., Mary Jo Melone, Times Publishing Co., and William Riley Jent v. In re: Public Records, ____ So.2d ____, 11 Fla.L.W. 1533 (Fla. 2d DCA, July 9, 1986).

3. St. Petersburg Times, August 1, 1986; The Tampa Tribune, August 1, 1986.

be back before the district court for reconsideration in the event that becomes appropriate in light of the new activity that is taking place in these cases. In doing this, we make no suggestion as to how this Court might rule on the other issues presented on these appeals. If the cases come back on appeal, either by the state or the petitioners, all issues presented to the federal forum can be considered at once with some hope of finality.

Since this opinion will be useful only to counsel and the district court, all of whom are thoroughly familiar with the facts and the prior legal proceedings in these cases, it is unnecessary here to recite any matters other than those upon which we are ruling.

[1] First, both Miller and Jent claimed ineffective assistance of counsel.[4] The

4. Miller claimed that he was denied effective assistance of counsel because his counsel (1) failed to obtain a forensic pathology expert to rebut the state expert's testimony that the victim was alive when burned; (2) failed to renew the motion for appointment of an investigator; (3) failed to take reasonable preparatory steps for the purpose of adducing impeachment evidence needed to implement his trial strategy of attacking the credibility of the state's witnesses; and

state trial court held evidentiary hearings on these issues. The Florida Supreme Court affirmed the trial court's denial of relief. **Jent v. State**, 435 So.2d 809, 810-13 (Fla. 1983) (attaching the trial court's order denying relief as an appendix to the opinion); **Miller v. State**, 435 So.2d 813, 814 (Fla. 1983).

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alternative lines of defense.

Jent claimed that his counsel (1) failed to obtain a forensic expert in pathology to rebut the State expert's testimony that the victim was alive when burned; (2) failed to obtain a forensic expert to rebut the State expert's testimony that it was "highly likely" that the hair found near the crime scene belonged to Jent; (3) failed to secure an expert on drug use who would cast doubt on the credibility of the State's witnesses who had mental or drug-related problems; (4) failed to request court apointment of a second psychiatrist and make any inquiry into mitigating circumstances; (5) failed to object to the court's failure to define sexual battery as the underlying felony in the felony murder charge and failed to object to the mitigating factors instruction which allegedly limited the jury's consideration to only statutory mitigating factors; (6) failed to investigate and adequately cross-examine the State's witnesses; and (7) conflict of interest by his first defense counsel.

The federal district court, in reviewing the ineffective assistance of counsel claims in separate opinions for Jent and Miller, accorded the state court's decision a presumption of correctness. In both cases the court stated:

> Where, as in the instant ineffective assistance of counsel claims, there has been a full evidentiary hearing on the merits of the claim, there is a presumption of correctness to the state court's findings. See 28 U.S.C. § 2254(d); **Sumner v. Mata**, 449 U.S. 539 [101 S.Ct. 764, 66 L.Ed.2d 722] (1981). That presumption can only be rebutted if the petitioner establishes one of seven exceptions to section 2254(d) or if the Court's independent review of the record leads it to conclude that the record when considered as a whole does not fairly support the state court's findings.
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> In order to overcome that presumption, the petitioner must establish that the state court's findings are 'not fairly supported by the record.' 28 U.S.C. § 254(d)(8). Under § 2254(d), however, state court findings are entitled to a high measure of

> deference and '[t]his deference requires that a federal habeas corpus must more than simply disagree with the state court before rejecting its factual determination.' **Marshall v. Lonberger**, [459 U.S. 422], 103 S.Ct. 843, 850 [74 L.Ed.2d 646] (1983). Rather, a federal habeas court must defer to state court findings in the absence of convincing evidence to the contrary. **Rushen v. Spain**, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983).

Miller v. Wainwright --- Case No. 83-849-Civ-T-13, slip op. at 18 & 20 (M.D.Fla. April 30, 1984); **Jent v. Wainwright**, Case No. 83-860-Civ-T-13, slip op. at 29 & 31 (M.D.Fla. April 30, 1984).

This was an incorrect standard, and contrary to the now accepted standard set forth by the United States Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where it said:

> . . . in a federal habeas challenge to a state criminal judgment, a state court

conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of 'basic, primary, or historical fact[t],' **Townsend v. Sain**, 372 U.S. 293, 309, n.6 [83 S.Ct. 745, 755, n.6, 9 L.Ed.2d 770] (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See **Cuyler v. Sullivan**, 446 U.S. [335], at 342 [100 S.Ct. 1708 at 1714, 64 L.Ed.2d 333 (1980)]. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. Id. at 689, 104 S.Ct. at 2070.

Although the state argues that the district court granted the presumption only as to the historical facts found by the state court, everything in the record before us shows that the district court accorded the presumption to the mixed law-fact question of ineffectiveness, and not just to the finding of historical facts, which would be entitled to the presumption. The ineffective assistance of counsel claims must be reexamined by the district court under the correct Strickland standard.

Second, both Miller and Jent attempted to obtain the grand jury testimony of witnesses who testified against them at their separate trials. Miller's case involved the grand jury testimony of two eyewitnesses to the crime, Carlena Jo Hubbard and Glenna Frye. Jent's case involved Hubbard and Frye, and a third eyewitness, Patricia Tirikaine.

[2-4] To obtain grand jury testimony, a defendant must show a particularized need, sufficient to justify the revelation of generally secret grand jury proceedings. **See Dennis v. United States**, 384 U.S. 855, 870, 86 S.Ct. 1840, 1849, 16 L.Ed.2d 973

(1966); **United States v. Proctor & Gamble** Co., 356 U.S. 677, 683, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958). The district court held that the standard had not been met in this case because the witnesses were thoroughly cross-examined with prior deposition testimony contrary to their trial testimony. It is precisely because of this contradiction in the testimony that someone should look at the grand jury testimony to determine its usefulness to the defendants. **Dennis**, 384 U.S. at 872- 73, 86 S.Ct. at 1850-51. The petitioners are not now asking that their convictions or sentences be set aside on the basis of this claim, but merely assert that some court should at least conduct an **in camera** review of the testimony to determine its relevance and usefulness to the defendant. Sometimes an **in camera** inspection of material is necessary to determine if a party has shown sufficient particularized need. The threshold showing for an **in camera** review is not as high as that needed to obtain the evidence. The district court incorrectly applied the higher test in its response to this claim.

If the grand jury testimony is the same as that at trial, it would obviously be of no use to the defendant. If it is the same as the deposition testimony, contrary to that at trial, it might or might not be useful, since the deposition was used at trial. If it were a third version, unlike either the trial or deposition, it strikes us that it would probably be useful to a jury in trying to sort out what is true and what is not. As the Supreme Court stated in **Dennis**, 384 U.S. at 855, 86 S.Ct. at under these type of circumstances, "it is especially important that the defense, the judge and the jury should have the assurance that the doors that may lead to truth have been unlocked."

[5, 6] The state argues that a defendant has to establish what is in the grand jury testimony to avoid the rule that such testimony will not be revealed on pure speculation. That sets too high a threshold, however, when it appears clear that the testimony, under oath, is bound to differ from other testimony, given under oath. **Dennis**, 384 U.S. at 872-74,

86 S.Ct. at 1850-51; **Proctor & Gamble**, 356 U.S. at 683, 78 S.Ct. at 986; **State of Wisconsin v. Schaffer**, 565 F.2d 961, 966 (7th Cir. 1977). Since the Court knows of two different versions under oath, it is quite apparent that the grand jury testimony cannot agree with both. This takes away the speculation as to the possible usefulness of the grand jury testimony. To ultimately decide the merits of the defendant's request, it is incumbent upon some court to review the grand jury testimony of the three testifying eyewitnesses to determine if the defendant has the particularized need sufficient to overcome the need for secrecy. Since neither the state or federal court has reviewed this evidence, the case must be remanded to the district court to consider the claim involving the grand jury testimony under the correct standard.

[7] **Third**, we consider a claim relating to the sentencing of Miller. Miller claims the trial court excluded mitigating testimony concerning his rehabilitative capacity during the sentencing proceeding. In reviewing this claim, neither the state or district court had the benefit of the

principle recently set forth in Skipper v. South Carolina, ____U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). At the Skipper sentencing hearing, at which the state sought and obtained the death penalty, the defendant attempted to introduce testimony of two jailers and one "regular visitor" to the jail to show that the defendant had "made a good adjustment" during his time spent in jail. The trial court refused to admit the testimony on the ground that it was irrelevant. Its decision was affirmed by the South Carolina Supreme Court. The United States Supreme Court reversed this decision, holding that the exclusion of this kind of testimony deprived Skipper of his right to place before the sentencer relevant evidence in mitigation of punishment. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Although the state trial court limited the testimony of a court appointed psychologist, the Florida Supreme Court

found no reversible error because the jury recommended life imprisonment. **Miller v. State**, 415 So.2d 1262, 1263 (Fla. 1982), **cert. denied**, 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983). This decision misses the point of the claim. The state trial judge overrode the jury recommendation of life and sentenced Miller to death. The question is whether the trial judge considered evidence as to rehabilitation to be mitigating.

The federal district court in denying relief to Miller on this claim noted that although the trial judge arguably restricted the psychologist's testimony concerning rehabilitative capacity, an analysis of the totality of the testimony showed that the witness did in fact testify about Miller's rehabilitative capacity.

There is some question about this decision. In a post-trial affidavit, the doctor states that in accordance with the trial court's limiting instructions, he "refrained from touching upon any matter having to do with rehabilitative capacity." He states that, if permitted, he would have testified that (1) Miller has

the intellect, motivation, and adaptive capabilities to be successfully rehabilitated, (2) the only requirement for furthering his rehabilitative capacities would be the development of a specially-tailored counseling program, (3) Miller has the family support and encouragement necessary for rehabilitation, and (4) Miller has an optimistic prognosis for rehabilitation. The doctor primarily testified about Miller's personality characteristics, particularly his tendency to take on the characteristics of the people around him. This testimony was given in an attempt to prove the mitigating factor that Miller had acted "under the substantial domination of another person" in committing the murder. Fla.Stat.Ann. § 921.141(6)(e).

Whether or not there was sufficient testimony as to rehabilitation, however, is not the consideration in not meeting the Skipper standard that should be applied in the case. The district court must determine whether the trial judge, in setting the death sentence, freely considered rehabilitation to be a

mitigating factor. The fact that the trial court heard the testimony is not enough. The district court must determine whether he gave it the significance it was entitled to under Skipper.

The judgments denying habeas corpus relief are vacated and the cases are remanded to the district court for reconsideration of these three issues under the correct standards. It may now be that further information being developed in this case will be relevant to these issues. The district court is, of course, free to consider any other claims that have been made or will be made in light of the ongoing proceedings in state and federal court, including the issue of whether any additional evidentiary hearings are needed.

VACATED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-3175

EARNEST LEE MILLER,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; RICHARD DUGGER, Superintendent, Florida State Prison, Starke, Florida; and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

No. 85-3185

WILLIAM RILEY JENT,

Petitioner-Appellant,

versus

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation; RICHARD DUGGER, Superintendent, Florida State Prison, Starke, Florida; and JIM SMITH, Attorney General of the State of Florida,

Respondents-Appellees.

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Appeals from the United States Court
for the Middle District of Florida

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ON PETITION FOR REHEARING
(September 26, 1986)

Before RONEY, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by the appellees in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

Peter Fay /s/
United States Circuit Judge